10643

No. 85.

Brief of Cruce v Cruce

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SUPREME COURT OF THE UNITED STATES.

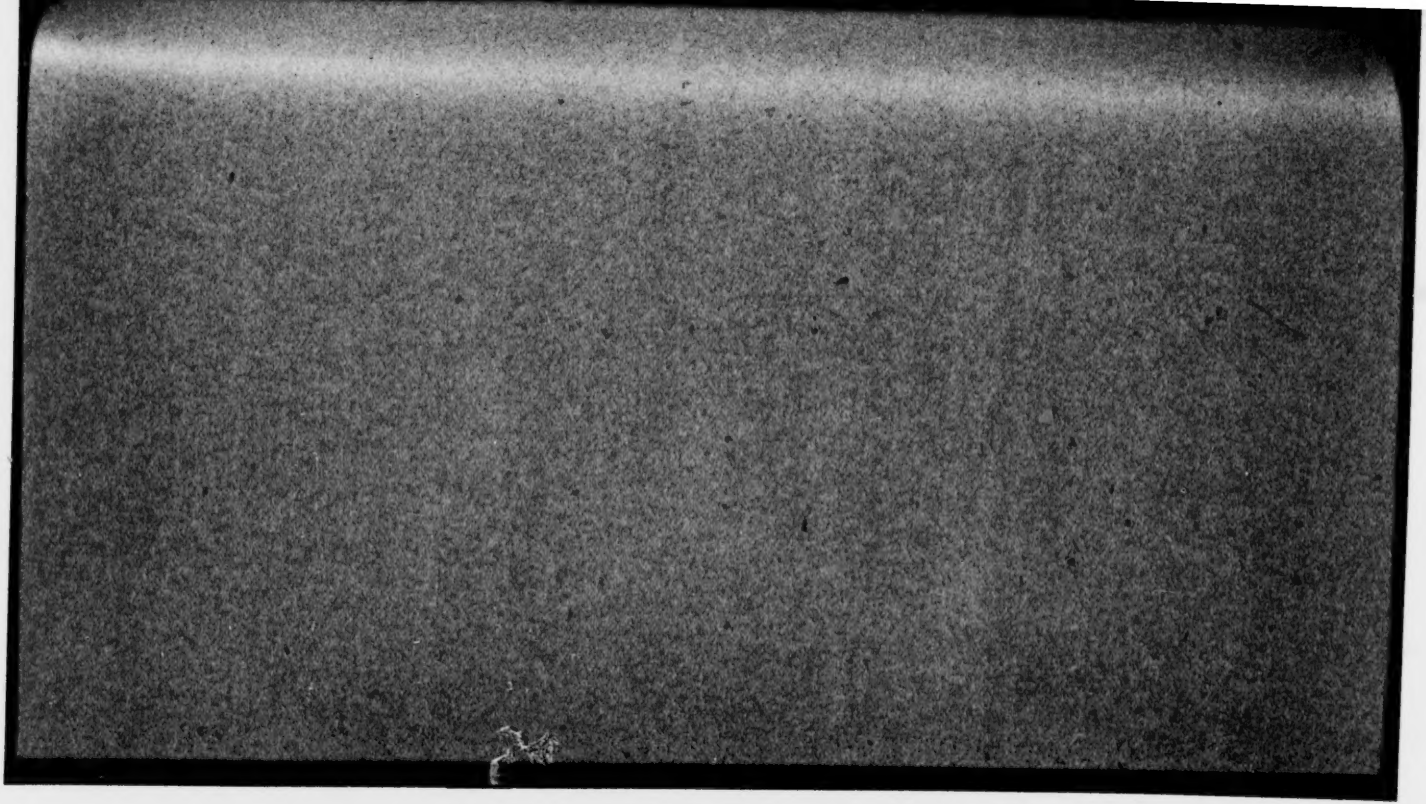
THE LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY,
PLAINTIFF IN ERROR.
vs.
T. K. KEARNEY AND J. W. WYSE,
Composing the partnership firm of Kearney & Wyse.
DEFENDANTS IN ERROR.
No. 85

BRIEF OF APPELLEES.

A. C. CRUCE,
Attorney for Appellees.

Associate Counsel:
W. I. CRUCE.

Judge-Cole Stone Job Print.



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BRIEF OF DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

The Defendants in Error can not accept the statement of the Plaintiff in Error. The statement is incorrect in declaring "That it was admitted on the trial that the plaintiffs below had no inventory and that they did not keep a complete set of books."

We adopt the following statement of Judge Thayer, who delivered the opinion of the Court in this case in the Eighth Circuit Court of Appeals, sitting at St. Louis:

"Concerning the facts of the case there is practically no dispute. On the night of April 18, 1895, between the hours of one and three a. m., a fire accidentally broke out in a livery stable in the town of Ardmore, which was about three hundred yards distant from the plaintiffs' place of business. Efforts to arrest the progress of the conflagration failed, and when it approached so near the plaintiffs' place of business that the windows of their store were cracking from the heat, and the building was about to take fire, one of the plaintiffs entered the building for the purpose of removing the books of the firm to a safer place, thinking it would be better to remove them than to take the chances of their being destroyed by fire He opened an iron safe in the store in which they had been deposited for the night, which was called a fire proof safe, and took them therefrom and to his residence, some distance away. The books consisted of a ledger, a cash book, a day book or blotter, and a small paper covered book containing an inventory, that the firm had taken of their stock, about January 1, 1895. In the hurry and confusion incident to the removal of the books, the inventory was either left in the safe and was destroyed, or was otherwise lost, and could not be produced after the fire. The other books, however, were saved, and were exhibited to the insurer after the fire and were subsequently produced as exhibits on the trial. There was neither plea nor proof that the loss of

the inventory was due to fraud or bad faith on the part of the plaintiffs, or either of them."

II. The statement of the Plaintiff in Error wholly omits the circumstances connected with the signing of the bill of exceptions. This case was tried on the 23d day of September, 1895, and the bill of exceptions was settled on the 5th day of December, 1896. (R. 70). The facts connected with the signing of the bill of exceptions, are briefly stated by Judge Springer, Chief Justice of the Court of Appeals for the Indian Territory, in the opinion rendered in this case on the 25th day of June, 1898:

"The case was tried in the court below on the 23rd day of September, 1895. Motion for new trial was overruled and sixty days' time was allowed within which to prepare and file bill of exceptions. By two separate agreements, signed by attorneys for both parties, the time for preparing and signing the bill of exceptions was extended until the 19th day of January, 1896. On December 28, 1895, the attorney for the appellant received the bill of exceptions from the court stenographer. On January, 13, 1896, the attorney for the appellant appeared at Ardmore to present his bill of exceptions to Judge Kilgore, but he was not there at that time, being in attendance upon the United States Court of Appeals for the Indian Territory, at South McAlester. The attorney started immediately for South McAlester, and, on arriving there, learned that Judge Kilgore had, on the day before his arrival, departed for the city of

Washington, where he was called upon public business. The attorney thereupon sent the bill of exceptions by express to Judge Kilgore at Washington, where the same was received on January 18, the day before the time for signing the same had expired. Judge Kilgore declined to sign the bill of exceptions upon the ground that it did not contain a true record of the case, and for the further reason that it had never been presented to the attorneys for the appellees. An application was made to the United States Court of Appeals for the Indian Territory for a writ of mandamus to compel Judge Kilgore to sign the bill of exceptions. The Court refused to grant the writ of mandamus for the reason that Judge Kilgore, in his response to said writ, stated that at the time the bill of exceptions was presented to him, he had no means of examining the official report for the purpose of correcting the bill of exceptions, and he refused to sign the purported bill of exceptions presented to him for the reason that it was incorrect. He further stated that no other different bill of exceptions was ever presented to him for his signature, and further that he was willing to sign a correct bill of exceptions in the case, and would have signed the same had a correct one been presented to him within the time fixed by the Court, but that in his judgment he had lost jurisdiction of the matter after the 18th day of January, 1896."

By reference to the response of Judge Kilgore to the alternative writ of mandamus (R. 82 to 84) it will be seen that the official stenographer furnished

the attorneys for the defendant below a correct transcript of the proceedings had upon the trial of this cause, twenty-five days before the expiration of the time granted to defendant below in which to file its bill of exceptions. That defendants "eliminated from the transcript furnished by the stenographer portions of the record which show the charges of the trial court, and the exceptions thereto, and inserted in lieu thereof eleven typewritten pages which contained other and different things from what occurred in the trial of the cause, and which was in no wise a correct and accurate bill of exceptions.

ARGUMENT.

Will the Court consider the bill of exceptions in this case? The case was tried on the 23rd day of September, 1895, and what purports to be a bill of exceptions was signed by the judge on the 5th day of December, 1896. Two terms of Court had intervened, towit.: the February and September terms. Sec. 5157 of Mansfield's Digest (Ark.) which is the law in the Indian Territory, provides, "That a party objecting to a decision must except at the time the decision is made, and time may be given to reduce the exception to writing, but not beyond the succeeding term." This statute is construed in Carroll vs. Saunders. 38 Ark., 217: "Time cannot be given beyond the next succeeding term to that at which exceptions were taken, in which to prepare and tender

a bill of exceptions, and a bill of exceptions signed by the judge after the term at which they were taken, where time has not been given, or after the next term thereafter, *though such time were given, is a nullity.*"

By virtue of two agreements signed by appellees' counsel, the trial judge reserved the power to settle the bill of exceptions at any time prior to and including the 19th day of January, 1896. After that date its power to settle the bill of exceptions was gone.

It is true that the bill of exceptions was tendered to the trial court on the 18th day of January, 1896, in the city of Washington. He refused to sign the bill, however, giving as his reason that he had no opportunity to consult the official stenographer's report for the purpose of correcting it; that a correct record had been prepared by the stenographer and furnished the appellant, but that appellant had purposely changed the record so as to make it speak an untruth. (Rec. p. 83). This record had been furnished to the appellant on the 24th day of December, 1895, and we submit that it was appellant's fault, and not the fault of the trial judge, that a proper bill of exceptions was not signed within the time reserved by the agreements heretofore referred to.

Should the Court, however, entertain the bill of exceptions, we submit there is no proper exception, either to the Court's charge, or to the refusal of the Court to give the instructions requested by

the defendant. The record (pp. 64-5) shows that at the conclusion of the Court's charge "The counsel for defendant arose and stated: 'I desire to except to the instructions asked by the attorney for the plaintiffs; and also to some portions of your honor's charge. There are some parts of the charge I do not desire to except to.'" Whereupon the Court remarked: Very well, sir; you will be permitted to take your exceptions.

"And afterwards, to-wit, on the 13th day of January, 1896, the defendant prepared his exceptions to said charge, as it contends, in accordance with the permission above given, and herewith presents the same as follows, and asks that they may be made a part of the record in this case and allowed as exceptions. The court refused to allow said exceptions, but permitted the same to be printed in the record for the purpose of enabling the Court of Appeals to determine whether said exceptions are properly taken. The charge, with the exceptions thereto *tendered* by the defendant, is as follows." Then follows in the record the Court's charge, with specific objections thereto. The defendant contended that it had the right to specialize the exceptions four months after the trial of the cause. It is not deemed necessary to cite authorities to show that this general exception is tantamount to no exception at all.

II.

The appellant is correct in stating that, "The real question in this case is raised by the state-

ments and instructions of the trial court under the assignments of error 12, 13, 14, 15, which is, whether the iron safe clause of the policies of insurance sued on in this action, is a promissory warranty and must be *strictly* complied with. By the terms of the policies, appellees bound themselves to keep a set of books showing a complete record of their business, as well as an inventory, securely locked in a fireproof safe at night, and at all times when the store mentioned was not actually open for business, or in some other secure place, not exposed to a fire which would destroy the business house; and in the event of loss to produce such books and inventory. The testimony is overwhelming in this case, that the appellees did keep a set of books, showing a complete record of their business, together with the inventory, and that all of such books were, on the night of the fire, securely locked in a fireproof safe in their building. In their efforts to remove the books from the safe during the fire the inventory was inadvertently lost, and for that reason the appellees were unable to produce it. Does this bar their right to recover?

If the terms of the iron safe clause, which required that the appellees should produce the inventory after the fire, must be literally complied with, then it is confessed that appellees cannot recover. We submit, however, that such construction cannot be given the terms of the policy.

A sufficient number of Courts have construed this provision of insurance policies to indicate

clearly what the law is. Before referring to these authorities, however, it may be well to suggest that the rules governing other contracts are applied in the construction of insurance contracts:

"It may be well to observe here, because there are unconsidered suggestions to the contrary, that the principles of interpretation applicable to contracts of insurance are the same as those which obtain in the case of other contracts. * * * * * * * * When it is said that a contract of insurance is a contract *uberrimæ fidei*, this only means that the good faith, which is the basis of all contracts, is more especially required in that species of contract in which one of the parties is necessarily less acquainted with the details of the subject of the contract than the other. Its language, says Nelson, C. J., 'is to receive a reasonable interpretation; its intent and substance, as derived from the language used, should be regarded. There is no more reason for claiming a *strict literal* compliance with its terms than in ordinary contracts. Full legal effect should always be given to it for the purpose of guarding the company against fraud and imposture. Beyond this, we would be sacrificing substance to form—following words rather than ideas.' Indeed, a moment's reflection will render it apparent that there is nothing in an agreement about insurance intrinsically more sacred or inviolable than in an agreement about any other subject matter. It differs only from others in the fact that, from the nature of the contract of insurance and the rela-

tions of the parties, occasions therein more frequently arise where the rights of the respective parties depend upon the exercise of good faith. And while the older cases had oftener to deal with the want of good faith on the part of the insured, the modern ones are full of examples where the Courts have been compelled to a liberal application of the doctrines of waiver and estoppel to protect the insured against defenses founded on a want of good faith on the part of the insurer" (May on Insurance, 3rd Ed., Sec. 172).

"The designation 'iron safe' is not construed to mean an iron receptacle for books and papers that will be an absolute protection against fire. The words are not used in their literal, but in the popular and ordinary sense. The merchant who warrants to keep his books securely locked during the night time in such a safe will need, in showing performance, to do no more than establsh the fact that his records were contained in an iron safe of such character as are in common use by other merchants and business men for the same purpose. Whether or not the warranty has been performed will be a question for the jury.

"Substantial compliance with the 'iron safe' clause requires the keeping of a suitable safe, such a one as will afford reasonable protection under such circumstaaces as each particular case presents. What would be necessary in an ordinary dwelling or small country store would often be wholly insufficient in a manufacturing establishment, where the safe would be exposed to great intensity of

heat in case of a conflagration. *Ordinary judgment and good faith are demanded of the insured, and when this is shown he may be excused from literal performance.*" (Ostrander on Fire Ins., Sec. 303).

In Jones, et al , vs. Southern Insurance Company, 38 Fed. Rep. 19, Judge Caldwell holds that a literal compliance with the terms of the "iron safe" clause is not necessary. In that case the policy contained the "iron safe" clause in the exact terms of the policy in this record. The fire occurred at nine o'clock at night. The insured had a fireproof safe in their store, in which they kept their merchandise books when not in use. The clerk had closed the doors of the store and was posting up the books preparatory to putting them in the safe. He left the store, however, at the invitation of a friend to take lunch, and while gone the store, together with the books, was destroyed by fire, the books having been left open on the counter. A literal construction of the terms of the "iron safe" clause would have defeated plaintiffs' right to recover. The fire occurred at night, when the books were neither in the iron safe, nor any other safe place, so far removed from the place of business as that a fire destroying it would not destroy the books; neither were the plaintiffs able to produce any of the books after the fire. They were, however, permitted to recover.

In Western Assurance Co. vs. Redding, 68 Fed. Rep., 708, the Circuit Court of Appeals for the Fifth Circuit, speaking through Judge McCor-

mick, holds that a strict compliance with the terms of the "iron safe" clause is not required. In that case, the facts were, that the store was burned between two and three o'clock in the night, and not during business hours, and when the store was closed. The insured kept an inventory and a set of books, showing a record of his business. Assured had a cash book in which he made daily entries of cash sales, which was inadvertently left out of the safe, the night of the fire, and was destroyed. Being unable to produce this book after the fire, the insurance company contended that no recovery could be had—that a strict compliance with the terms of the policy was required. The Court disposed of this contention in the following language:

"The policies in common use are travesties on the common sense form in use in marine insurance. And while the distinctions and constructions announced in Pawson vs. Watson, Cowp. 785, and in De Hahn vs. Hartley, supra, are too well settled to be disturbed by judicial action, there has long been a marked and growing judicial sense that the application of these, and later cases in line with them, should not be carried beyond the boundaries of controlling precedents, that common honesty and common sense are safe guides in the construction of even these wonderfully devised contracts. While, therefore, it is certainly the law that a precedent condition warranted to exist must in fact exist, exactly as stated, or there will be no contract, because the minds meet only on all

the stipulated conditions, a promissory warranty is often, if not always, necessarily a condition subsequent, and courts should, and do, and will, apply to these the doctrines that obtain in adjudging forfeitures. It would too greatly extend this opinion to review the cases. Many of them are cited and epitomized in the third edition of May on Insurance, in the chapters on Warranties, Representations and Exceptions. We think the application to the case at bar of what we have here advanced is apparent. The judgment of the Circuit Court is affirmed."

The case of East Texas Fire Insurance Company vs. Harris, 25 S. W. Rep., 720 (Texas) was a suit upon a policy containing a clause in the exact terms of the "iron safe" clause in the policy sued on in this case. The facts were: "The plaintiff kept all the books required by said clause of the policy, showing all the facts thereby required, in a fireproof safe, as required, in the store house where he did business, and where the property was burned. Said books were locked up in a safe at the time of the fire in question; but Mr. Harris (appellee's clerk and bookkeeper) fearing that the safe would not be able to withstand the fire, and that the books would be destroyed, if left in the safe while the fire was in progress, opened the safe, and took therefrom said books and inventory, and other papers belonging to the plaintiff, intending to remove them to a place of safety; and, while so doing, persons outside of the building called to him to come out, as the walls

were falling. When so called, he had said books, papers and inventory in his arms, and, as he ran out of the burning building, some of them fell from his arms, and were destroyed by the fire. The documents and books so destroyed included the plaintiff's last inventory of stock, and the merchandise account, showing the goods purchased by plaintiff, and his cotton book and cotton calcution." In that case the insurance company contended that the warranty in the iron safe clause had been broken. The Court said:

"If it be conceded that the clause referred to constitutes a warranty, we do not think the facts show, as contended by the appellant, that it was broken. It did not require appellee, absolutely and unconditionally, to keep his books in a fireproof safe. It required him to keep them in such a safe, or in some secure place, not exposed to a fire that would destroy the house where the business was carried on. Having the alternative right to keep them in a place of safety, other than in a safe, he also had the right to take them from the safe, and remove them to such other place; and if he exercised due care in so doing, and they were lost, there is no breach of warranty. The trial court filed no conclusions of law, but we presume it held that the attempted removal of the books at the time of the fire was not negligence, and we are not prepared to say that such holding was wrong. Although a literal reading of the policy would apparently justify such a construction, we do not think that it was intended by the parties

that the mere failure to produce the books and inventory, although kept in the manner and at a place required, should forfeit all appellee's rights under said policy. For instance, if he had kept them securely locked in a fireproof safe, and, without fault on his part, burglars had blown open the safe, and stolen them, his failure to produce them at the trial would not have breached his warranty, if warranty it be."

Brown vs. Palatine Insurance Co., 35 S. W., 1060, is a case from the Supreme Court of Texas. The insured had bound himself by the same iron safe clause contained in the policy sued on in this action. A part of his books were left out of the safe on the night of the fire and were destroyed. Judge Brown, speaking for the Court, says: "In the construction of policies of insurance, the same rules of law will be applied as in the construction of contracts made between individuals under like conditions, and no greater strictness is required in the performance of the one than the other. It is often said that a warranty in a policy of insurance must be strictly complied with, and sometimes it is said that it must be literally fulfilled; but this is no more true of that character of contract than of others, and means no more than that when the language is clear it must be performed as expressed, which is equally true of all kinds of written undertakings. * * * * The subject to which this warranty relates is the keeping of a set of books in a mercantile business, in which the sales were to made and recorded by a

number of clerks, and, when so made, to be transferred by other employes. In other words, it was a business to be transacted for the insured by employes. It is a matter of common knowledge that absolute accuracy in such business is unattainable, and it would be, perhaps, an impossible thing to find a set of books, which would show the transaction of such business with the accuracy claimed by the insurance company. These things must have been in contemplation of the parties when the contract was made, and it will not be presumed that the parties intended to prescribe that which was practically impossible. A *substantial* performance of the contract would suffice in that case; that is, the contract is to be construed as including no more than could be reasonably expected of the insured."

The Kentucky Court of Appeals, in Phœnix Insurance Company, vs. Angel, 38 S. W., 1067, disposes of this question as follows:

"It is, however, admitted that the inventory and books were not kept in a fireproof safe, nor in any fireproof place or apartment; but it is claimed that the agent at the time knew that the assured had no fireproof safe, nor anything of the kind, and waived that part of the policy; and, if that be true, then the failure of the assured in that regard cannot defeat a recovery in this case. But we are of the opinion that a failure to comply with such a provision, although in the policy, would not work a forfeiture thereof. It is without consideration. It does not decrease the risk, and at most

would only tend to the better preservation of the evidence to show the amount of the loss sustained in the case of fire. It does not seem to us that it is competent to contract with the assured for the preservation of testimony in behalf of either party."

This doctrine was re-affirmed by the Kentucky Court in Mechanics & Traders' Insurance Company vs. Floyd, 49 S. W. 543, and in Citizens' Insurance Co. vs. Crist, 56 S. W. 658.

The case of McNutt vs. Virginia Fire Insurance Co., 45 S. W. 61, (Tenn.) holds that a *substantial* compliance with the requirements of the iron safe clause is all that is necessary. It is there held as to the iron safe provision, "The rule of construction should be honesty, good faith, and good common sense."

The Georgia Court, in the case of the Liverpool and London and Globe Insurance Co. vs. Ellington, 21 S. E. Rep., 1006, lays down the same doctrine.

The Alabama Court, in the case of Georgia Home Insurance Co. vs. Allen, 24 Southern Rep., 399, sustains the same common sense rule.

The Alabama Court quotes with approval Section 2063, 3 Joyce on Insurance, which is as follows: "In a federal case it is held, a *substantial* compliance is sufficient under the 'iron safe clause,' requiring a set of books and an inventory to be securely locked in a fireproof safe at night, and at all times when the store is not actually open for business, or in some secure place, and that in case of loss assured will produce said books and inven-

tory; such a clause is a condition subsequent only, and a literal, exact fulfillment is unnecessary. This decision certainly seems more in accord with the actual intent of the parties, and with the justice and reason of the law, and with the tendency of the decisions, than a construction requiring an exact and literal compliance."

To the same effect is Kemendo vs. Western Assurance Co., 57 S. W., 293 (Texas); Penn. Fire Insurance Co. vs. Brown, 36 S. W., 590 (Texas); Sun Mutual Insurance Co. vs. Brown, 36 S. W., 591 (Texas).

The Supreme Court of Arkansas, in the case of American Central Insnrance Co. vs. Ware, 46 S. W., 129, supports the same doctrine. The defense in this case was that the assured had failed to comply with the iron safe clause. "The adjuster for the defendant, after the fire, made some examination of the inventory, invoice and books kept by the plaintiffs. During the course of this examnation he discovered certain incorrect entries in the books kept by the plaintiffs prior to the issuance of the policy, and thereupon he abandoned the adjustment, and declined to make further examination." The defendart company now contends that the plaintiffs failed to produce all of their books to the adjuster. The plaintiffs admitted that they had failed to produce the memorandum book kept by the clerk, Moffit, but the evidence on their part tended to show that this was the result of inadvertence, and wholly unintentional. The evidence of the plaintiffs

tended to show that all the other books were produced to the adjuster, while on the part of the defendant there was evidence to show that a book called the "blotter" was not produced. "The Court told the jury that it was the duty of the plaintiffs to produce their inventory and books, but that if, through inadvertence or oversight, the plaintiffs failed to produce one or more of their books to the adjuster, this could not preclude a recovery. We see no error in this instruction."

Judge Sanborn, who rendered the dissenting opinion in the Circuit Court of Appeals in the case at bar, collated all the authorities which it is claimed sustain the doctrine that a literal compliance with the terms of the "iron safe" clause is indispensible to a recovery. The case of Kelley Goodfellow Shoe Co. vs. Liberty Insurance Company, 28 S. W. Rep., 1028, and American Fire Insurance Co. vs. First National Bank, 30 S. W. 384, both Texas cases, are cited as sustaining this doctrine. An examination of these cases, however, it is believed will disclose the fact that they do not sustain the contention of the learned judge. In these cases the question before the Court was whether the provisions of the "iron safe" clause constituted a *warranty*, or whether they were simply *representations*.. The Texas Civil Court of Appeals held that they were warranties and not representations. The question, however, as to whether the warranty should be literally complied with, or whether a substantial compliance was all that was necessary was not before the Court.

The case of Landman vs. Hartford Fire Insurance Co., 18 Insurance Journal, 813, quoted by Judge Sanborn, it is believed, likewise fails to sustain the contention of the appellant. In that case the plaintiff's son and his clerk left the store building about 12 o'clock at night, and failed to put the books in the iron safe, except the inventory, which had not been taken out of the safe. The fire occurred about two o'clock at night, and all the books, except the inventory, were destroyed. The Court held that the insured could not recover, using the following language: "The Court cannot add to or detract from the law they (the parties) have made for themselves, or say that the promissory warranty shall not be enforced because it is not material. It is enough that the parties agreed to it. . However foolish, improvident, or immaterial it may be, it must be *substantially* complied with. In this case the clause has been violated. It is no compliance, *in substance*, by the assured, with his promise, to place his books in his iron safe 364 days out of the 365 days in the year, if the day on which the property was burned was the day in the year on which the books were not placed in the safe, nor is it compliance, *in substance*, to place only the invoice book, showing the purchases, and leave out the book showing the sales, both for cash and on credit, the daily transactions, and a copy of his last inventory of stock."

It will be remembered, that in this case there is no contention of any act of bad faith or fraud on the part of the appellees. It is not denied in

the pleadings that their loss aggregated the sum of ten thousand dollars, which was only partially covered by insurance of thirty-five hundred dollars. It is admitted that the inventory and other books were all kept in a fireproof safe until the time the fire attacked their building. The testimony of one of the appellees is that he thought it safer to remove the books from the safe to some other place of safety. It is not contended that he was guilty of any carelessness or bad faith in attempting to do this. The terms of the policy gave him the alternative right to keep the books either in the safe or in some other place of safety. It would be an anomaly to say that he had the right to take his books out of the safe and move them to some other place of safety, and then to say that if while exercising this right, which he had under the terms of the policy, and without fault, he lost his book, he could not recover. No Court has ever held such a doctrine, and we are loath to believe that any Court will ever so hold.

Before leaving this branch of the case we desire to correct the erroneous statement in appellant's brief, "That the books left in the safe were not destroyed by the fire, even though the door was left open." There is absolutely nothing in the record to justify this statement. The only testimony upon this point is found on page 16 of the record, where the trial judge propounded the following questions to one of the plaintiffs:

Q. When did you first miss that book (inventory)—discover you had lost it? A. When the safe was OPENED, after the fire.

By the Court: Did you close the safe after taking the books out?

A. Just shut the door. I don't remember whether I bolted it or not.

III.

It is not deemed necessary to refer at length to appellant's contention that the books kept by the appellees were not such as were contracted for under the terms of the policy. Whether they were such a set of books as complied with the terms of the policy was a question for the jury to determine. The books, such as were kept, were introduced before the jury; and it is a significant fact that the appellant has not brought into the record a single page from one of these books.

It is impossible for this Court, with the testimony before it, to ascertain whether or not the books did contain a correct statement of appellees' business. Both of the plaintiffs testified that while no *one* book showed a complete record of their business, yet *all* of their books when taken *together* did show such a record.

The plaintiff, Kearney, on cross-examination, testified as follows (record, pp. 19-20):

Q. I will ask you to look at that book, Mr. Kearney, and state if it is not a ledger, kept in the way ledgers are kept, according to a system of bookkeeping?

A. Yes, sir.

Q. That book is a cash book (meaning the second book)?

A. Yes, sir.

Q. Is it not a fact that the ledger simply shows the total amount taken from the other books?

A. It shows the cash sales.

Q. When were these memoranda on this book made up, at the time of sale?

A. Yes, supposed to be, if we kept up with the books.

Q. When a sale was made for cash, in the order of business there, you put that on it?

A. No, sir; took it from the day book.

Q. This is not an original entry, then?

A. Taken from the day book.

Q. This cash book is not an original entry book?

A. No, sir.

Q. Now, what book is this (referring to third book)?

A. We used that for a day book.

Q. What does that book in a general way contain?

A. *Shows all the transactions of the day.*

Q. All the transactions of the day?

A. *Yes, sir.*

Q. This book then is the only one that shows the daily transactions?

A. That shows the entries, *everything on it.*

Q. The business of the day is contained in this book?

A. *Yes, sir.*

Q. From this book the cash book and the ledger are made up?

A. Yes, sir.

It was the province of the jury to determine whether or not this witness was telling the truth; and we again insist that if appellant desired to contradict the witness, it was its duty to introduce at least specimen pages of the book, so that this Court might determine whether the system of bookkeeping, adopted by the appellees, was such as was contracted for under the terms of the policy.

Respectfully submitted,

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Associate Counsel:

W. I. CRUCE.